Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

INTERSTATE LITHO CORP.,

Petitioner,

versus

MARC A. BROWN, A/K/A MOSHE BROWN, INTEGRA TECHNICAL SERVICES, INC., AND FREIDEL'S MANUFACTURING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals Ruled Contrary to the Standards of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938) and Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136 (1965) and Improperly Sanctioned the District Court's Failure to Apply State Substantive Law Which Precludes a Non Registered Foreign Corporation from Suing in State Courts in Affirming the District Court's Grant of the Counterclaim Plaintiff's Motion to Substitute Party and Amend Counterclaims Pursuant to Federal Rules of Civil Procedure 15 and 17.

II. Whether the Court of Appeals Departed From the Accepted and Usual Course of Judicial Proceedings and Improperly Sanctioned the District Court's Failure to Apply State Substantive Law Which Prohibits a Dissolved Corporation from Conducting Business in Affirming the District Court's Grant of the Counterclaim Plaintiff's Motion to Substitute Party and Amend Counterclaims.

III. Whether the Petitioner was Deprived of Procedural and Substantive Due Process When the Court of Appeals Applied the Wrong Standard of Review to the Ruling of the District Court Where No Evidentiary Hearing Was Conducted and No Rationale Was Provided by the District Court.

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PETITION FOR WRIT OF CERTIORARI

Interstate Litho Corp. respectfully petitions for writ of certiorari to review the decision and judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit that gives rise to this petition is reported at 255 F.3d 19; it is reprinted in the Appendix hereto ("App.") at App. 1a. The ruling of the United States District Court for the District of Massachusetts denying the Counterclaim Defendant's Motion for Summary Judgment and denying the Counterclaim Plaintiff's Motion to Substitute Party and Amend Counterclaims is not reported; it appears at App. 25a. The ruling of the United States District Court for the District of Massachusetts granting the Counterclaim Plaintiff's Motion to Substitute Party and Amend Counterclaims is not reported; it appears at App. 27a.The rulings of the United States District Court for the District of Massachusetts denying the Counterclaim Defendant's Motions for Judgment as a Matter of Law are not reported; they appear at App. 29a and 30a.

JURISDICTION

On April 26, 1999, the United States District Court for the District of Massachusetts issued an order granting Counterclaim Plaintiff Integra Technical Services, Inc.'s Motion Substitute Party and Amend Counterclaims to substitute Defendant Marc A. Brown as Counterclaim Plaintiff. At the close of its case and again at the close of the evidence, Plaintiff-Counterclaim Defendant Interstate Litho Corp. moved for judgment as a matter of law with respect to the counterclaims of Brown. Interstate's motions were

summarily denied, without decision by the trial court. (App. 29a; 30a). Judgment was entered by the trial court on July 31, 2000. (App. 21a).

Interstate Litho Corp.'s notice of appeal to the United States Court of Appeals for the First Circuit was filed on August 15, 2000. On October 17, 2000, the trial court issued an Amended Judgment to include the jury verdict in favor of Freidel's Manufacturing, Inc.[1](App. 23a). A second notice of appeal was filed on October 25, 2000 and both appeals were subsequently consolidated.

In an opinion filed on July 6, 2001, the United States Court of Appeals for the First Circuit affirmed the rulings of the District Court and entered its judgment on July 6, 2001.(App. 20a).

Pursuant to 28 U.S.C. § 2101 (c) and Supreme Court Rule 13 (1) this petition has been filed within ninety (90) days of the entry of judgment.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Section I:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of

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[1] The claims against Freidel's' Manufacturing, Inc. have been resolved and a Stipulation of Judgment has been filed with the United States Court of Appeals for the First Circuit.

law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rules Enabling Act, 28 U.S.C. § 2072:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Federal Rule of Civil Procedure 15 (a):

...Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires....

Federal Rule of Civil Procedure 17:

(a) Every action shall be prosecuted in the name of the real party in interest....No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder, or substitution of, the real party in interest: and such ratification, joinder or substitution shall have the same effect as if the action had been

commenced in the name of the real party in interest.

(b) ...The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized....

Massachusetts General Laws, Chapter 181 § 3:

Every foreign corporation which does business in the commonwealth or which has a usual place of business in the commonwealth ...shall be considered to be doing business in the commonwealth for the purposes of this chapter unless its activities within the commonwealth consist of no more than one or more of the following: (a) maintaining bank accounts; (b) maintaining or appointing trustees; (c) holding meetings of its directors or shareholders; (d) participating or appearing in any action or suit or any administrative or arbitration proceeding, or in the settlement thereof or the settlement of claims or disputes: or (e) performing activities subject to regulations under chapter one hundred sixty-seven or chapter one hundred and seventy-five, if the foreign corporation has complied with the applicable chapter or chapters.

Massachusetts General Laws, Chapter 181 § 4:

Every foreign corporation doing business in the commonwealth shall file with the state secretary, within ten days after it commences doing business in the commonwealth, a certificate signed under penalties of perjury by its president or a vice-

president and its clerk or an assistant clerk, or secretary or an assistant secretary, in such form as the state secretary shall require.... Attached to said certificate shall be a certificate of legal existence of such foreign corporation issued by an officer or agency properly authorized in the state or country in which such foreign corporation was organized or other evidence of legal existence acceptable to the secretary....

Massachusetts General Laws, Chapter 181 § 9:

Every foreign corporation which fails to file an initial certificate or an amended certificate as required by section four shall, for each such failure and for each year that each failure shall continue, be fined not more than five hundred dollars. No such failure shall effect the validity of any contract involving the foreign corporation, but no action shall be maintained or recovery had in any courts of the commonwealth by the foreign corporation as long as such failure continues....

New Hampshire Revised Statutes, Chapter 293-A:14.05 (a):

(a) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs....

New Hampshire Revised Statutes, Chapter 293-A:14.21 (a):

> (a) If the secretary of state determines that one or more grounds exist under RSA 293-A:14.20 for dissolving a corporation, the secretary of state shall administratively dissolve the corporation by signing and mailing a notice of dissolution to the corporation at its principle address as listed in the records of the secretary of state. Such notice shall recite the grounds for dissolution and effective date....
>
> (b) A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under RSA 293-A:14.06 and 293-A:14.07.

STATEMENT OF THE CASE

Integra Technical Services, Inc. ("Integra") was a New Hampshire corporation doing business in Massachusetts which acted as a broker of used printing equipment. In January 1995, Marc A. Brown ("Brown"), representing himself to be the project manager for Integra made a cold call to Interstate to offer its services in locating printing presses for sale and developing proposals for reconditioning or remanufacturing the presses. However, at the time, Integra had been dissolved as a corporation and was not authorized to carry on any new business transactions. (App. 36a). Integra was also not qualified to do business in the Commonwealth of Massachusetts. (App. 43a).

On August 25, 1995, a proposal was sent from Integra to Interstate for the purchase and remanufacturing of two printing presses. On August 29, 1995 Brown instructed

Interstate to wire $50,000 to Freidel's Manufacturing Co. (Freidel's) and $25,000 to Integra's account to hold the two presses during the negotiation process. Interstate wired the funds as requested with the understanding that all deposits would be refundable. On or about October 1995, Interstate informed Integra that it could not proceed because Interstate was unable to obtain appropriate financing and requested the return of his deposits. None of the deposits were refunded by either Freidel's, Integra or Brown.

Interstate asserted claims against Integra and Brown for breach of contract, return of its deposit, fraud and deceptive business practices. Integra filed a counterclaim for breach of contract, alleging that Integra lost profits and commissions as a result of Interstate's failure to complete the proposed transaction for the purchase and remanufacture of the printing presses. The issue before this Court pertains only to Integra's counterclaims and whether the allowance of the amendment to substitute Brown for Integra as the counterclaim plaintiff comported with federal choice of law principles and procedural and substantive due process.

It its decision, the Court of Appeals failed to address state substantive law pertaining to corporate standing and capacity. The Court of Appeals erroneously sanctioned the district court's use of Federal Rules of Civil Procedure 15 and 17 to circumvent state law and erred in reviewing the district court's decision under the abuse of discretion standard, acting in abject derogation of its duty to comprehend and review controlling questions of state law. (App. 5a-7a).

ARGUMENT

I. The First Circuit's Ruling Affirming the District Court's Grant of the Counterclaim Plaintiff's Motion to Substitute Party and Amend Counterclaims Pursuant to Federal Rules Civil Procedure 15 and 17 Was Contrary to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817

(1938) and *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136 (1965) and Improperly Sanctioned the District Court's Failure to Apply State Substantive Law Precluding a Non Registered Foreign Corporation from Suing in State Courts.

A. The Court of Appeals Erroneously Elevated Federal Rules of Civil Procedure over State Substantive Law in Violation of the *Erie* Doctrine and its Progeny.

The Court of Appeals' ruling cannot be allowed to stand as it exhibits a complete disregard for state substantive law by affirming the use of Fed. R.Civ. P. 15 and 17 to abrogate controlling state law which precluded Integra from suing in state or federal court.

Federal choice of laws jurisprudence under the *Erie* doctrine requires that in a diversity case, such as the present case, the federal court is to apply the law of the forum state in which it sits. *Erie Railroad Co. v.Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938). *See Crellin Technologies, Inc. v. Equipmentlease Corp.*, 18 F.3d 1 (1st Cir. 1994); *Santiago v. Sherwin-Williams Co.*, 782 F.Supp. 180, 191(D.Mass. 1992). State law precluding a foreign corporation from suing in state courts is substantive law and must be applied in a diversity action in federal court. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 536-7, 69 S.Ct. 1235, 1236-7 (1949). See *Feinstein v. Massachusetts General Hospital*, 643 F.2d 880, 888 (1st Cir. 1981) (recognizing applicability of state door-closing statutes to diversity actions in federal court).

In *Woods v. Interstate Realty Co.*, the Court held that the policy of *Erie Railroad Co. v. Tompkins* precluded the federal court in diversity cases from maintaining suits to which the state had closed its courts. Thus, a Tennessee corporation which had not qualified to do business in Mississippi could not maintain an action in Mississippi courts, whether state or federal. *Id.*

In what appears a contradiction, Fed. R.Civ. P. 17 (b) provides that "the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." By its plain terms, the Rule seems to contemplate that a foreign corporation may file suit in federal court so long as it has the capacity to sue under the law of the state of its incorporation and regardless of whether it does so also under the law of the forum. This conclusion is wrong.

The choice of law where there is a conflict between federal procedure and state substantive law was resolved by the Court in *Hanna v. Plumer*, 380 U.S. 4360, 85 S.Ct. 1136 (1965). In *Hanna v. Plumer* the Court determined that where a federal rule of civil procedure directly conflicts with a state law of the forum, the district court should apply the federal rule, provided that it does not exceed the authority of the Supreme Court under the Rules Enabling Act, 28 U.S.C. § 2072. The Rules Enabling Act provides that rules promulgated by the Supreme Court may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072.

The precedence of state substantive law over Fed. R. Civ. P. 17 (b) has not been squarely addressed in the circuit courts. However, because Rule 17 (b) abridges the substantive right of the forum state's citizens to encourage foreign corporation qualification by closing the door to its courts, it exceeds the Supreme Court's power under the Rules Enabling Act. *Netherlands Shipmortgage Corp., Ltd. v. Madias*, 717 F.2d 731 (2nd Cir. 1983*); McCollum Aviation, Inc. v. Cim Associates, Inc.*, 438 F.Supp. 245 (S.D.Fla.1977). Additionally, the forum's door-closing statute should control to the exclusion of Rule 17 (b) because the door closing statute effects the initial choice of forum and *Erie* sought to eliminate forum shopping. *Power City Communications v. Calaveras Telephone Co.*, 280 F.Supp. 808 (E.D.Cal. 1968).

Accordingly, the law of the forum state, Massachusetts, which closed the door of its courts to Integra, should have been applied by the district court and the Court

of Appeals to void any judgment obtained in the federal court.

B. Integra's Counterclaims Against Interstate Should Have Been Dismissed Pursuant to Governing Massachusetts Law.

Massachusetts law requires every foreign corporation doing business in the Commonwealth to file certain certificates and reports with the state secretary. M.G.L. ch. 181 § 4. "Every foreign corporation which does business in the commonwealth or which has a *usual place of business in the commonwealth* ... shall be considered to be doing business in the commonwealth for the purposes of this chapter ...". M.G.L. ch. 181 § 3. (Emphasis added). Integra was a foreign corporation organized under New Hampshire law and its sole place of business was in Brookline, Massachusetts, as was its only telephone line, facsimile machine and corporate bank account. Consequently, Integra fell squarely within the reporting requirements of M.G.L. ch. 181 § 4.

Pursuant to controlling Massachusetts law, where a foreign corporation fails to file the documents required by Section 4 with the Secretary of State, "no action shall be maintained or recovery had in any courts of the Commonwealth by the foreign corporation as long as such failure continues." M.G.L. ch. 181 § 9. *See Orion Insurance Co. v. Shenker*, 23 Mass. App. Ct. 754, 505 N.E. 2d 561 (1987). This provision has been held to bar a foreign corporation's right to assert counterclaims as well. *Offline Micros, Inc. v. Provetto*, 1990 Mass. App. Div. 114 (1990).

The certification from the Massachusetts Secretary of State's Office conclusively established that Integra never registered as a foreign corporation doing business within the Commonwealth. (App. 43a). Based on these uncontroverted facts, Integra was not entitled to assert its counterclaim in a Massachusetts court, whether state or federal, and any verdict

in its favor should have been rejected by the Court of Appeals as void as a matter of law.

II. The First Circuit's Ruling Affirming the District Court's Grant of the Counterclaim Plaintiff's Motion to Substitute Party and Amend Counterclaims Departed From the Accepted and Usual Course of Judicial Proceedings and Improperly Sanctioned the District Court's Failure to Apply State Substantive Law Which Prohibits a Dissolved Corporation from Conducting Business.

A. The Court of Appeals Failed to Exercise its Duty to Conduct a De Novo Review of the Determinative Legal Issue of Capacity, Thereby Depriving Petitioner of Procedural and Substantive Due Process.

In its decision, the Court of Appeals sidestepped the issue of Integra's corporate capacity and standing under state law and erroneously reviewed Brown's standing as a party to the contract as a pure question of fact. (App. 5a-7a).

The issue before the district court in this case, the legal capacity of a corporation to enter into a contract, was a question of law for the court and was not a factual issue to be determined by the jury or a matter to be left to the discretion of the district court. The Court of Appeals erred in applying the abuse of discretion standard to the district court's decision to grant Brown's motion to substitute party and amend its counterclaims. *Salve Regina College v. Russell*, 499 U.S. 225, 239-240, 111 S.Ct. at 1225-1226 (courts of appeals must review state law questions *de novo*).

The courts of appeals owe no deference to a district court's adjudications of state law. *Salve Regina College v. Russell*, 499 U.S. 225, 239-240, 111 S.Ct. 1217, 1225-1226 (1991). Where the trial court bases its findings upon a

mistaken impression of applicable legal principles, the reviewing court must not adhere to the clearly erroneous standard of review. *Inwood Labs. v. Ives Labs.*, 456 U.S. 844, 855 n.55, 102 S.Ct. 2182 (1982). A mistake of law always constitute an abuse of a court's discretion. *United States v. Snyder*, 136 F.3d 65, 67 (1st Cir. 1998).

B. Integra, a Dissolved Corporation, Was Stripped of the Capacity to Conduct New Business, Precluding It From Asserting Claims Based Upon Prohibited Transactions.

The certified records from the New Hampshire Secretary of State's Office conclusively established that Integra was dissolved on November 1, 1993. (App. 36a). Pursuant to the New Hampshire Business Corporation Act, N.H.R.S.A 293-A:14.05 (a) "A dissolved corporation continues its corporate existence but *may not carry on any business* except that appropriate to wind up and liquidate its business and affairs...". (Emphasis added). Thus, as of November 1, 1993, Integra possessed no corporate capacity to enter into any contracts or agreements. N.H.R.S.A. 293-A:14.21. *See Halliwell Associates, Inc. v. C.E. Maguire Services, Inc.*, 586 A.2d 530 (R.I. 1991) (applying Massachusetts law) ("At common law the legal dissolution of a corporation marked the death of its corporate existence and, in the absence of statutory provisions to the contrary, terminated that existence for all purposes whatsoever.").

Brown, as President of Integra, was notified by the New Hampshire Secretary of State's Office on three separate occasions of the dissolution of Integra and the procedure for reinstatement, on January 4, 1993, November 1, 1993 and March 4, 1994. (App. 37a-42a). Notwithstanding Integra's corporate dissolution, at all times material to the business transacted with Interstate, Brown held himself out as the Project Manager and agent of Integra. The contract at issue

clearly listed Integra and Interstate as parties. However, at the time, August 1995, there was no corporate entity which possessed the authority to transact business or enter into a contract with Interstate. Consequently, there existed no viable legal corporation with the capacity to pursue counterclaims based upon an alleged breach of that contract. *Pagounis v. Pendleton*, 52 Mass. App. Ct. 270, 753 N.E.2d 808, 812 (2001) (claim belonged to corporation, not shareholder, where dissolved corporation was the named party to the contract).

C. Brown Possessed No Legal Capacity to Assert Claims Against Interstate.

An officer or shareholder of a dissolved corporation does not possess the capacity to sue on its behalf. *Lorisa Capital Corp. v. Gallo*, 506 N.Y.S. 2d 62, 73 (A.D. 2 Dept. 1986); *Metered Appliances, Inc., 75 Owners Corp.*, 638 N.Y.S.2d 631 (A.D. 1st Dept. 1996) (dissolved corporation has no capacity to bring suit on business conducted after dissolution); *Sturtevant v. Town of Winthrop*, 732 A.2d 264 (Me. 1999) (breach of contract claim did not devolve to shareholder following corporation's dissolution). In *Lorisa*, the Court expressly found that a dissolved corporation lacked the capacity to use the courts to enforce obligations arising out of the conduct of prohibited new business, concluding that where the corporation failed to comply with statutory requirements for reinstatement, the corporation was legally dead and could no longer sue. *Id* at. 71.

Once Integra had been dissolved it was legally dead and could not conduct new business. Integra accrued no rights to sue for alleged debts arising from illegally conducted new business. *Carreiro v. Rhodes Gill & Co., Ltd.*, 68 F.3d 1443 (1st Cir. 1995) (statute that allowed suit by dissolved corporation after dissolution only applied to causes of action that existed prior to dissolution). *A fortiori*, Brown, as officer or shareholder of Integra, could not succeed to

rights which Integra itself never possessed. *See Halliwell Associates, Inc. v. C.E. Maguire Services, Inc.*, 586 A.2d at 535 (shareholder of dissolved corporation does not have a legally recognizable property interest in an unasserted corporate contract claim).

It was clear error to conclude that the absence of legal capacity could be cured simply by substituting a new plaintiff. *Automated Information Processing, Inc. v. Genesys Solutions Group, Inc.*, 164 F.R.D. 1 (E.D.N.Y. 1995); *Corbin v. Blankenburg*, 39 F.3d 650, 653 (6th Cir. 1994). In *Automated*, the court denied a motion to substitute brought after the plaintiff discovered that the named corporation had been dissolved years prior to the action, reasoning:

> Nothing about the situation here suggests that justice requires the relief the "new" plaintiffs seek. The information concerning A.I.P., Inc.'s non-existence was certainly within Mr. Stadler's responsibility and ability to ascertain. The very first paragraph of the original complaint affirmatively states that "Automated Information Processing Inc. is a corporation duly organized and existing under the laws of the State of New Jersey," and it is of course a party's obligation to conduct a reasonable inquiry concerning the truth of the allegations made in its pleadings. ... In the circumstances, justice would not be served if the plaintiffs were rewarded for their failures, oversights and misrepresentations by permitting an amendment of their pleadings where it is otherwise unwarranted by the rules."

Id at 3-4.

Interstate was entitled to judgment as matter of law on Integra's counterclaims because at the time of the events at issue, Integra was no longer a viable corporation, had been dissolved by the New Hampshire Secretary of State's office, did not possess the authority to transact business either in New Hampshire or Massachusetts and lacked capacity to pursue its counterclaim against Interstate. Consequently, Integra could not transfer any cognizable interest to Brown sufficient to invoke substitution pursuant to Fed. R. Civ. P. 17 (b) or Fed. R. Civ. P. 25 (c) and Brown had no legal standing to assert counterclaims against Interstate as a matter of law. Accordingly, the district court's allowance of Brown's motion to substitute, and the affirmance by the Court of Appeals, must not be sustained.

III. The First Circuit's Ruling Affirming the District Court's Grant of the Counterclaim Plaintiff's Motion to Substitute Party and Amend Counterclaims Deprived the Petitioner of Procedural and Substantive Due Process by Applying the Wrong Standard of Review Where No Evidentiary Hearing Was Conducted and No Rationale Was Provided by the District Court.

A. The Decision of the Court of Appeals Deprived Petitioner of Procedural and Substantive Due Process By Sanctioning the Ruling of the District Court Without Applying the Proper Legal Standards.

The motion to substitute Brown as the counterclaim plaintiff was nothing more than a blatant attempt to avoid entry of summary judgment once it became known that Integra neither possessed the authority to enter into a contract nor to sue for the alleged breach thereof as established by public records and governing New Hampshire and Massachusetts law. In its review of the district court's ruling,

the Court of Appeals failed to consider, analyze and apply the questions of law in light of the procedural history and posture of the case. Moreover, the Court of Appeals affirmed the district court's ruling despite acknowledging the conflicting accounts of events surrounding Integra's dissolution, the lack of evidentiary hearing and the complete absence of a written or oral rationale by the district court.[2] Both the unexplained ruling by the district court and the unwarranted deference by the Court of Appeals deprived Petitioner of its due process rights.

"A party's belated attempt to revise its pleadings requires that a court examine the totality of the circumstances and exercise sound discretion in light of the pertinent balance of equitable considerations." *Quaker State Oil Refining v. Garrity Oil Co.*, 884 F.2d 1510, 1517 (1st Cir. 1989); *Resolution Trust Corp. v. Gold*, 30 F.3d 251, 252 (1st Cir. 1994). Where, as here, the motion to amend was not filed until after a motion for summary judgment, a party is required to demonstrate that the proposed amendments are supported by "substantial and convincing evidence." *Resolution Trust Corp. v. Gold*, 30 F.3d 251, 252 (1st Cir. 1994); *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7th Cir. 1979) (given the pendency of a summary judgment motion, party was required to show amendments had substantial merit). The higher standard must be imposed because the motion to amend is astutely recognized to be a belated attempt to alter the shape of the case for the purpose of defeating summary judgment. *Ruiz v. Posadas De San Juan Associates*, 124 F.3d 243, 250 (1st Cir. 1997).

Fed. R.Civ. P. 15 (a) grants the Court the discretion to allow a party to amend its pleadings "when justice so requires." Fed. R.Civ. P. 17 (a) was intended to allow for

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[2] In fact, the trial court initially denied Brown's motion to substitute on March 30, 1999 (App. 25a) and inexplicably reversed itself and granted the motion on April 26, 1999. (App. 27a).

substitution of parties to insure against forfeiture and injustice when an understandable mistake has been made selecting the party in whose name the action should be brought. *See* Advisory Committee Notes. Brown's failure to ascertain Integra's corporate status prior to bringing its counterclaims was not understandable and should not have been countenanced by the trial court or rubber-stamped by the Court of Appeals.

As a direct result of Integra's abject failure to inquire as to its corporate status during the course of this litigation Interstate suffered substantial prejudice as it was compelled to file the following pleadings: Objection to Motion to Amend Answer and Memorandum in Support; Answer to Counterclaims; Objection to Motion for Partial Summary Judgment and supporting pleadings; Supplemental Memorandum in Support of Objection to Motion for Partial Summary Judgment; Motion for Summary Judgment with Respect to Counterclaims of Defendant Integra Technical Services and supporting pleadings.

In this case, the Court of Appeals seriously erred and deprived Petitioner of due process when it sanctioned the district court's failure to apply the higher standard to Brown's belated motion to substitute and amend its counterclaims after summary judgment had been filed by Interstate, as there was no finding by the district court of substantial and convincing evidence to support said motion.

B. The Court of Appeals Deprived Petitioner of Procedural and Substantive Due Process By Sanctioning the Ruling of the District Court Where No Evidentiary Hearing Was Conducted and No Rationale Was Provided by the District Court.

The right to a full and fair opportunity to be heard on an issue is protected by the due process clause of the United States Constitution. *See, e.g., Mathews v. Eldridge*, 424 U.S.

319, 332-33, 96 S.Ct. 893, 901-902 (1976). When competing sworn affidavits may result in one or more genuine issues of material fact, due process requires that a district court hear the evidence to assess the credibility, or lack thereof, of one side as opposed to the other. *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 72 (3rd Cir. 1993); Cf. *Minnesota Mining & Manufacturing Co, v. Eco Chem, Inc.*, 757 F.2d 1256, 1259 (Fed. Cir. 1985); *See also Panther Pumps & Equipment Co., Inc. v. Hydrocraft, Inc.*, 566 F.2d 8, 16-17, 23-24 (7th Cir. 1977).

In this case, Brown himself submitted conflicting affidavits during the course of the litigation which should have been weighed against the certified public records submitted by Interstate. (App. 36a-43a). According to the certified records of the New Hampshire Secretary of State's Office, Integra was administratively dissolved on November 1, 1993 and due notice was sent to Marc Brown on three separate occasions, January 4, 1993, November 1, 1993 and March 4, 1994. (App. 36a-42a).

Brown's motion to substitute and amend asserted that he was "not aware" of the dissolution of Integra at the time of the transactions at issue in this case. However, Brown offered no documents or other objective facts to substantiate his bald assertions. Brown proffered no explanation for not verifying whether Integra had been reinstated *prior* to filing its counterclaims or *prior* to filing his motion for partial summary judgment to absolve himself from personal liability based upon Integra's separate corporate status. In the affidavit filed in support of his motion to substitute, Brown asserted "that at all times relevant to the transactions at the heart of the case, Marc Brown and Integra were one and the same." This statement was diametrically opposed to contentions set forth in the affidavit Brown submitted in support of his Motion for Partial Summary Judgment wherein Brown duly swore and attested that Integra "was a legitimate corporation which followed all corporate formalities."

The conflict in the movant's own sworn statements required an evidentiary hearing to assess the asserted facts and credibility. *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d at 72. Furthermore, where the district court failed to provide any rationale for its decision, its decision was not entitled to any deference by the Court of Appeals. *Quaker State Oil Refining v. Garrity Oil Co.*, 884 F.2d at 1517.

The failure to afford Interstate a full and fair opportunity to be heard violated due process and, accordingly, the judgment of the district court and the affirmance by the Court of Appeals must be reversed.

CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 00-2344, No. 00-2522

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

INTERSTATE LITHO CORP.,
Plaintiff, Appellant,

v.

MARC A. BROWN, A/K/A MOSHE BROWN, INTEGRA TECHNICAL SERVICES, INC., AND FREIDEL'S MANUFACTURING, INC.,
Defendants, Appellees.

July 6, 2001, Decided

COUNSEL:
Thomas A. Tarro III, with whom Christine M. Curley was on brief, for appellant.

Keith A. Minoff, with whom John E. Garber and Robinson Donovan Madden & Barry, P.C., were on brief, for appellee Marc A. Brown.

Paul R. Wood, with whom James R. Miller, Matthew D. Macy, and Miller Wood Welch, LLC, were on brief, for appellee Freidel's Manufacturing, Inc.

JUDGES:
Before Selya, Lynch, and Lipez, Circuit Judges.

OPINION BY:
LYNCH

OPINION:

LYNCH, Circuit Judge. This commercial dispute concerns a failed attempt by the plaintiff, Interstate Litho Corporation, to acquire printing presses from a broker, defendant Marc A. Brown, doing business as Integra Technical Services, Inc. Trial resulted in a jury verdict against Interstate on its claims for return of a portion of its deposit from the seller of one press, defendant Freidel's Manufacturing, Inc., and for Brown on his counterclaims seeking lost profits on the deal. On appeal, Interstate argues that: (1) Brown lacked the capacity to sue because Integra had been dissolved at the time of the transactions at issue; (2) the purported contract with Brown for purchase of the presses was invalid; (3) its deposit to secure the presses was refundable; and (4) the award of lost profits resulted from flawed jury instructions and was not supported by the evidence. We affirm the judgment, and we grant Freidel's motion, but deny Brown's motion, for attorney's fees and double costs against Interstate.

I.

In 1995, Interstate Litho Corporation engaged in negotiations with Marc A. Brown, a broker in used printing equipment, and his company, Integra Technical Services, concerning Interstate's potential acquisition of two used printing presses. One press, an eight color press, was owned by Freidel's Manufacturing, Inc. of Illinois; the other, a four color press, was owned by Graphic Engineering and located in Malaysia. The two presses were to be refurbished in Rhode Island by E.R. Smith Associates to Interstate's specifications.

Several proposals were prepared, and finally a proposal reflecting a $2.6 million price was signed by Henry Becker, Interstate's President, on August 25, 1995. At Brown's instructions, Interstate advanced a $75,000 deposit to ensure that the presses would be held. Fifty thousand dollars of the

deposit was wired to Freidel's on August 29, 1995, to secure the eight color press; the remaining $25,000 was sent to Brown in his capacity as Integra's principal (of which $15,000 was forwarded to John Dulla, a broker assisting Brown with the purchase of a second press, the remainder staying with Brown). Freidel's pulled the eight color press off the market, turning away other prospective buyers. On September 27, 1995, Brown signed a contract to buy the eight color press from Freidel's. However, Brown never purchased the press from Freidel's because the deal with Interstate fell apart. Freidel's retained the deposit and eventually sold the press for less than it would have received from Brown.[1]

Interstate then sued Brown, Integra, and Freidel's, seeking the return of its $75,000 deposit. Integra counterclaimed for its lost commissions and profits on the deal, asserting claims against Interstate for breach of contract, fraud, and violation of Mass. Gen. Laws ch. 93A. Cross-motions for summary judgment were filed by the parties. Brown argued that Interstate had failed to provide evidence to allow a jury to pierce the corporate veil and hold him personally liable as an officer of Integra. Brown asserted that at all times he had acted in his representative capacity as an agent of Integra and that nothing in the record indicated otherwise. Interstate initially opposed Brown's summary judgment motion on the grounds that there was sufficient evidence that Brown, as Integra's only shareholder, officer, and director, had pervasive control over the corporation, and that Brown maintained no separation between the corporation and his home, where the corporation exclusively operated.

Interstate subsequently learned that Integra had been dissolved by the State of New Hampshire as of November 1, 1993, for failure to file reports and pay necessary fees. Interstate argued that because Brown had held himself out and solicited business under Integra's name after the corporation had been dissolved, Brown was personally liable as to Interstate's claims against Integra. Interstate also

maintained that Integra had no capacity to assert any counterclaims against it.

In response, Brown sought leave to amend his counterclaims and substitute himself personally for Integra as the real party in interest.[2] Brown recalled receiving letters from the corporate division of New Hampshire's Department of State, but believed he had taken the necessary steps to prevent dissolution. He said that he was not aware of Integra's dissolution at the time of the transactions at issue and did not learn about the dissolution until Interstate raised the issue on summary judgment.

The district court denied all the summary judgment motions as well as Brown's motion to amend and substitute himself personally for Integra. However, upon motion for reconsideration, the court allowed Brown's motion to amend and substitute himself as the real party in interest.

At trial, Interstate's principal claim was that Becker had not signed the purported contract for the sale of the presses. There was a battle of handwriting experts, and the jury rejected Interstate's suggestion that Becker's signature had been forged. Answering three special interrogatories, the jury rejected Interstate's claim for the return of the deposit and awarded Brown $187,500 on his counterclaim; the $50,000 portion of the deposit thus remained with Freidel's. Specifically, the jury determined that: (1) Marc A. Brown d/b/a Integra and Interstate Litho did not form a contract providing that monies paid by Interstate as a deposit were refundable; (2) Freidel's did not have money in its hands belonging to Interstate that in equity and good conscience it ought to pay back to Interstate; and (3) Interstate was in breach of its contract with Brown for the sale of two printing presses. Interstate's motion for a new trial was denied.

II.

Interstate appeals, raising a plethora of arguments, many addressed to the district court's pre-trial and post-trial rulings.[3] Most of those issues are subsumed into the contract questions submitted to the jury.[4] Interstate initially makes related arguments as to capacity to sue: that Brown should not have been substituted for Integra as a counterclaim plaintiff and that there was no valid and enforceable contract between Brown and Interstate because Integra's dissolution rendered any subsequent contract with Interstate void. Interstate also argues that there was no enforceable contract because the purported contract -- the August 25, 1995 proposal signed by Interstate -- did not contain the contract's essential terms, failed to comply with the statute of frauds, and could not have been performed by Brown. In addition, Interstate maintains that there was insufficient evidence for the jury to reject its claim for return of its $75,000 deposit.

As to damages, Interstate argues that Brown's damage award cannot stand because it was based on speculation, not facts in evidence, and because the district court failed to properly instruct the jury in this regard.

Freidel's has filed a motion for attorney's fees and double costs on the ground that Interstate's appeal was frivolous. Brown has filed a similar motion. Interstate has filed oppositions to both motions.

The parties agree that Massachusetts law applies.

A. Capacity to Sue

Interstate on appeal makes a series of arguments about capacity to sue. In doing so, it confuses two issues. The first issue is whether the district court abused its discretion by allowing the motion to amend in order to substitute Brown for Integra. The second issue is whether, given that the amendment was allowed, Brown properly stood in Integra's shoes as a matter of fact. As to the second issue, it has been

waived because Interstate failed to make it an issue before the jury.

On the first issue, we review the allowance or denial of motions to amend the pleadings for abuse of discretion. See *Ruiz v. Posadas de San Juan Assocs., 124 F.3d 243, 250 n.11 (1st Cir. 1997); Resolution Trust Corp. v. Gold, 30 F.3d 251, 253 (1st Cir. 1994).*[5] Motions for leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); see also *Resolution Trust, 30 F.3d at 253* ("Leave to amend is to be freely given, unless it would be futile, or reward, inter alia, undue or intended delay.") (internal quotation marks and citations omitted). Here, Brown sought to substitute himself personally for Integra on the ground that he was the real party in interest, Integra having been dissolved by operation of law before the events in issue. See Fed. R. Civ. P. 17(a) ("Every action shall be prosecuted in the name of the real party in interest."). Brown maintained that at all times relevant he was Integra's sole officer, employee, and shareholder, and that he participated personally and directly in all transactions with Interstate.

The district court had before it conflicting accounts of the events surrounding Integra's dissolution. Interstate said Brown knew or should have known that Integra had already been dissolved for almost two years when it entered into discussions about the presses; Brown claimed that he believed Integra had complied with New Hampshire's requirements on reporting and filing fees, and that he was a real party in interest. The court could easily have concluded that Brown had more than a colorable claim, and it had evidentiary support for that conclusion. As a counterclaim plaintiff, Brown appeared to have the requisite stake. See *Seckler v. Star Enter., 124 F.3d 1399, 1406 (11th Cir. 1997)* ("In order for [plaintiff] to demonstrate that he is a real party in interest, [he] must allege facts sufficient to reveal that he suffered an injury, that the injury was caused by the

defendant's illegal conduct, and that his injury could be redressed by a favorable outcome to the lawsuit.").

Brown also was substituted as a defendant, and this benefitted Interstate; Interstate now had a live person, and not a defunct corporation, to answer for any judgment it obtained. Interstate attacks the allowance of the substitution motion, but it does not identify any prejudice resulting from that decision. Indeed, Interstate's trial preparation on the merits issues could hardly have been much different given its view, expressed in its opposition to Brown's motion for summary judgment, that Brown was Integra's alter ego. The trial court properly concluded that it was in the interests of justice for Brown to be substituted as the formal party in the pleadings. See Fed. R. Civ. P. 17 advisory committee's note (1966 Amendment) ("Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed . . . .").

Following the district court's decision to allow Brown's motion to amend and substitute, any questions as to whether Brown was indeed a proper party to the purported contract with Interstate were questions of fact for the jury. See *Assocs. Discount Corp. v. Haynes Garage, Inc., 304 Mass. 526, 24 N.E.2d 685, 687-88 (Mass. 1939)* (question of who contracting parties were is question of fact) (citing *Lunn & Sweet Co. v. Wolfman, 256 Mass. 436, 152 N.E. 893, 894-95 (Mass. 1926))*. If, after the substitution, Interstate wanted to challenge Brown's capacity to sue or raise any issue of fraudulent concealment by Brown of Integra's dissolved status, it should have done so before the jury. Interstate did not. Rather, its focus at trial was solely on other matters: contesting Brown's claim that Becker had signed the August 25, 1995 proposal; trying to prove the $75,000 deposit was refundable; and challenging Brown's own claims for damages.[6] Interstate may not now pursue these claims about capacity to sue on appeal.

B. Brown's Counterclaim For Breach of Contract

Interstate challenges the jury's verdict on Brown's counterclaims for breach of contract to purchase the two presses. There could be no contract between Interstate and Brown d/b/a Integra as a matter of law, Interstate argues,[7] because:

> 1. The essential terms were missing from the purported contract -- the August 25, 1995 proposal.
>
> 2. The proposal did not satisfy the statute of frauds.
>
> 3. The proposal was invalid because Brown was incapable of delivering the two presses.

Interstate also seeks the return of its $75,000 deposit, arguing that there was an express oral agreement with Brown that the deposit was refundable. In addition, Interstate argues that Freidel's should return the $50,000 portion of the deposit it retained under the law of equity and unjust enrichment. The trial court erred, Interstate says, in not granting it judgment as a matter of law at the close of evidence and after the jury's verdict. See Fed. R. Civ. P. 50(b).[8]

This court reviews de novo the denial of a motion for judgment as a matter of law using the same standard applied by the trial court. *Andrade v. Jamestown Hous. Auth., 82 F.3d 1179, 1186 (1st Cir. 1996).* Such motion may be granted only if "the evidence, viewed from the perspective most favorable to the non-movant, is so one-sided that the movant is plainly entitled to judgment, for reasonable minds could not differ as to the outcome." *FHS Props. Ltd. v. BC Assocs., 175 F.3d 81, 85 (1st Cir. 1999)* (quoting *Gibson v. City of Cranston, 37 F.3d 731, 735 (1st Cir. 1994)).*

1. Essential Terms of Contract Were Provided

The evidence was such that whether the August 25, 1995 proposal contained the essential terms of a contract was an issue of fact for the jury. The writing between the parties identified in detail the two presses being purchased, identified a total price for purchasing and reworking the presses ($2.6 million, with $900,000 of this amount allocated to acquiring the two presses), and set forth a detailed delivery and payment schedule.

Interstate argues, inter alia, that the proposal neither states that it is a final agreement for purchase of the two presses by Interstate from Integra nor provides in specific terms the completion date for refurbishment of the presses. However, "it is not required that all terms of the agreement be precisely specified, and the presence of undefined or unspecified terms will not necessarily preclude the formation of a binding contract." *Situation Mgmt. Sys. v. Malouf, Inc., 430 Mass. 875, 724 N.E.2d 699, 703 (Mass. 2000).* Here, the terms of the proposal -- which include nine pages of nitty-gritty detail on matters such as rollers and hangers, plate and blanket cylinders, and ink fountains -- were sufficient for the jury to find that Interstate had agreed to purchase the two presses. That Interstate wired $75,000 ($50,000 to Freidel's and $25,000 to Brown) to hold the presses on August 29, just a few days after signing the proposal, further supports the existence of a firm agreement between the parties. We cannot conclude as a matter of law that this contract lacked essential terms.

2. Statute of Frauds

Interstate argues that the proposal does not satisfy the Massachusetts Statute of Frauds, Mass. Gen. Laws ch. 106, § 2-201(1), because the August 25, 1995 proposal, though a writing, describes only the remanufacturing portion of the deal, and not the terms of the actual purchase of the two presses by Integra, for subsequent sale to Interstate. There

was, however, no reason the proposal had to describe the details of Brown's own purchase of the eight color press from Freidel's or the four color press from Malaysia. Indeed, the important questions for a buyer like Interstate would, presumably, have centered on whether the refurbished presses met its needs and specifications, and not on the background details of how the broker (Brown) obtained those presses from third parties. As Brown himself testified, his initial acquisition of the presses was accomplished through transactions separate and distinct from the sale of the refurbished presses to Interstate. Thus the issue, properly presented to the jury, was whether the August 25, 1995 proposal constituted an agreement by Interstate to purchase the two presses from Brown. The jury found that it did, and so the proposal was a writing in satisfaction of the Statute of Frauds.

3. Brown Could Have Delivered the Two Presses

Interstate also challenges the validity of the contract on the ground that Brown was incapable of delivering the two presses when Interstate signed the August 25, 1995 proposal. See *Doyle v. Hasbro, Inc., 103 F.3d 186, 194 (1st Cir. 1996)* (plaintiff must be ready, willing, and able to perform to sustain breach of contract claim); *Singarella v. City of Boston, 342 Mass. 385, 173 N.E.2d 290, 291 (Mass. 1961).* Again, this issue was for the jury.

Interstate argues that there was no evidence of any agreement to purchase the four color press from Malaysia, that Integra had not yet entered into an agreement to purchase the eight color press from Freidel's, and that Integra had not entered into any agreement with E.R. Smith for refurbishing the two presses. In fact, there was sufficient evidence for the jury to conclude that a deal was in the works and that Brown could have delivered the two refurbished presses to Interstate. Brown testified to his extensive efforts to locate and hold the presses, one of which had already been secured from

Freidel's (hence the need for the $50,000 deposit). Dulla testified about his efforts to obtain a second press in Malaysia, which was corroborated by his correspondence with the owner of the Malaysian press about price, shipping arrangements, and the like. Brown also testified that he had a verbal agreement with E.R. Smith to refurbish the two presses to Interstate's specifications, based on discussions and meetings with representatives of E.R. Smith and Interstate. Brown did not need fully executed written contracts with each of the parties he was dealing with on the Interstate project. Indeed, there was evidence that it was customary not to have such contracts in these types of deals. Whether Brown could have performed under the contract was for the jury to decide.

4. Whether the Deposit was Refundable

Interstate seeks the return of its $75,000 deposit, arguing that there was an express oral agreement with Brown that the deposit was refundable.[9] The jury rejected this claim. Brown testified that he told Interstate's Becker, before Becker paid the deposit, that the deposit was not refundable. Brown's testimony was supported by the testimony of Daniel Freidel, Freidel's president, and John Dulla that Freidel's needed a deposit from Brown to hold the eight color press. That Freidel's took the press off the market in exchange for the deposit, a fact not disputed at trial, further supported the jury's determination. There is no reason to disturb the jury's finding on this claim.

C. Damages: Jury Instructions and Evidence

Interstate argues that the court erred in rejecting its proposed jury instruction on damages and that the evidence was too speculative to support the jury's damage award. Interstate requests a new trial or a remititur.

1. Jury Instructions

The trial court instructed the jury that:

> If you find that . . . [Brown and Integra] are entitled to recover, recover under the counterclaim, then you are to award as damages a sum of money that will fully and fairly compensate Mr. Brown for what he would have received in income if the contract had not been breached.

Interstate asked for a specific instruction that the jury should not speculate and that the loss should be foreseeable and calculated with reasonable certainty.[10] The trial court said its instruction essentially amounted to the same thing. At that point, Interstate neither disagreed with the judge that the essence of the instruction had in fact not been given nor pressed its objection. We are doubtful that Interstate adequately gave the trial judge notice and preserved its objection. See Fed. R. Civ. P. 51; see also *Elgabri v. Lekas, 964 F.2d 1255, 1258-59 (1st Cir. 1992).* Moreover, the issue with respect to lost profits in this case, as explained more fully below, was not whether the jury would improperly speculate in awarding a sum based on its projections from data in evidence, but rather whether it believed Brown had agreements in place for commissions on the deal, ultimately a credibility question not open to any such speculation. A trial judge, who possesses particular insight into the main issues in a case, does not have an obligation to instruct a jury on every nuance of a party's claim or defense.[11] Given that the wording of instructions is within the trial judge's discretion, and given that here the trial judge could reasonably have understood that Interstate agreed that his instruction covered the lost profits issue, we find no error.

2. Evidence

Interstate argues that the damage award is inconsistent with the evidence and must have been based on pure conjecture. On this basis, Interstate argues, the district court erred in failing to grant a new trial or remititur.

A motion for a new trial requires a finding that "the verdict is so seriously mistaken, so clearly against the law or the evidence, as to constitute a miscarriage of justice." *Transamerica Premier Ins. v. Ober, 107 F.3d 925, 929 (1st Cir. 1997)* (internal quotation marks omitted). We review the district court's denial of a new trial motion for abuse of discretion. See *FHS Props., 175 F.3d at 87.*

Interstate argues, inter alia, that Brown's testimony as to acquisition costs and mark-up on the two presses was not supported by the evidence and also did not make allowance for the costs of transporting the presses. There was also no evidence, Interstate contends, that Brown had the ability to procure the four color press from Malaysia, as there was no signed agreement for the purchase of this press. However, the jury was entitled, on the evidence, to find to the contrary. Correspondence with the owner of the four color press as to pricing, shipping, and other basic contractual provisions was in evidence. Two other witnesses supported Brown's testimony that he had made the necessary arrangements and that the deal foundered on Interstate's failure to pay.

Brown testified as to the compensation he expected to receive: ten percent of E.R. Smith's $1.7 million price to refurbish the two presses ($170,000), plus half of the mark-up cost of $225,000 for acquisition of the two presses ($112,500), for a total of $282,500. From this Brown subtracted the $10,000 he had retained from the $75,000 deposit and requested a total of $272,500. The jury awarded him $187,500.[12] Interstate presented no reason not to credit Brown's testimony, and that testimony supplied an adequate basis for the jury's damage award. Cf. *Knightsbridge*

Marketing Servs. v. Promociones y Proyectos, S.A., 728 F.2d 572, 575 (1st Cir. 1984) ("The prospective profits need not be proved with mathematical accuracy; the plaintiff need only show by reasonable proof that he has lost profits.") (citation and internal quotation marks omitted).[13]

Interstate also argues that it cannot be held liable for payments Brown would have received from others, but that argument finds no support in the law. A seller may recover lost profits that he would have made had the buyer performed under the contract. See Mass. Gen. Laws ch. 106, § 2-708(2); *Cesco Mfg. Corp. v. Norcross, Inc., 7 Mass. App. Ct. 837, 391 N.E.2d 270, 274 (Mass. App. Ct. 1979).* Where a middleman broker is involved, and the buyer is in breach, the broker's damages may be measured by his lost profits. See 67A Am. Jur. 2d, Sales § 1129 (2d ed. 1985 and Supp. 2000) ("The Uniform Commercial Code follows the view that a . . . middleman should have as a measure of damages his lost profits where the buyer has breached."); see also *TCP Indus., Inc. v. Uniroyal, Inc., 661 F.2d 542, 552 (6th Cir. 1981)* (explaining the rationale for the rule under Michigan law). The jury's damage award stands.

D. Motions for Attorney's Fees and Double Costs.

1. Freidel's Motion

In order to prevail on appeal against Freidel's, Interstate effectively had to show in this fact-intensive case that no rational jury could have concluded that the $50,000 portion of the deposit paid to Freidel's was non-refundable and that it was equitable for Freidel's to retain it. It was undisputed at trial that Interstate knew Freidel's took the eight color press off the market in exchange for the deposit and suffered a detriment as a result. It was also undisputed that Freidel's was not a party to the contract between Brown and Interstate and had no business relationship with Interstate.

Because Interstate's claims against Freidel's were in equity and unjust enrichment, Interstate had to prove that Freidel's had no right to retain the deposit, regardless of the outcome of Interstate's underlying contract dispute with Brown. See *National Shawmut Bank v. Fidelity Mut. Ins. Co., 318 Mass. 142, 61 N.E.2d 18, 22 (Mass. 1945)* ("The fundamental question . . . is whether the defendant has received money which in equity and good conscience belongs to the plaintiff."); see also *Flower v. Suburban Land Co., 332 Mass. 30, 123 N.E.2d 218, 221 (Mass. 1954)* ("The right to recover in an action for money had and received does not depend upon privity of contract, but on the obligation to restore that which the law implies should be returned, where one is unjustly enriched at another's expense.") (internal quotation marks omitted). In light of the undisputed fact that Freidel's conferred a benefit upon Interstate and incurred a detriment as a result, restitution would have been improper. Cf. *National Shawmut Bank, 61 N.E.2d at 20-21.*

Even the authorities Interstate cites in its brief undermine its position, suggesting instead that Interstate must seek recovery of its deposit from Brown, not Freidel's, because Interstate made the deposit to Freidel's pursuant to its agreement with Brown. See *Bolen v. Paragon Plastics, 747 F. Supp. 103, 107 (D. Mass. 1990)* ("[A] person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person.") (quoting Restatement (Second) of Restitution § 115)); *LaChance v. Rigoli, 325 Mass. 425, 91 N.E.2d 204, 205 (Mass. 1950)* ("The contracting party must look for payment to the one . . . who was expected to pay and who in fact expected to pay or as a reasonable man should have expected to pay."). We award Freidel's its reasonable attorney's fees and double costs. See Fed. R. App. P. 38; see also *Toscano v. Chandris, S.A., 934 F.2d 383, 387 (1st Cir.*

1991); E.H. Ashley & Co. v. Wells Fargo Alarm Servs., 907 F.2d 1274, 1280 (1st Cir. 1990).

2. Brown's Motion

We feel differently, however, about Brown's motion for attorney's fees and double costs. While weak, Interstate's claims against Brown cannot be said to be frivolous.

III.

The judgment is affirmed. Attorney's fees and double costs to be awarded to Freidel's. Brown's motion for attorney's fees and double costs is denied. Freidel's shall file its attorney's fees application in accordance with Local Rule 39(b) of the First Circuit Court of Appeals. The Clerk shall tax, in the usual course, ordinary costs in favor of Brown and double costs in favor of Freidel's. We retain appellate jurisdiction for the purposes of adjudicating the attorney's fees award. So ordered.

Footnotes

[1] According to Freidel's, when it later attempted to make a deal with Interstate for the sale of the eight color press, it was informed that Interstate had already fulfilled its need.

[2] Brown also sought leave to amend the counterclaims to add further allegations under Mass. Gen. Laws ch. 93A based on Interstate's conduct in the transaction and Interstate's allegations of forgery by Brown.

[3] Brown has not appealed the district court's denial of his Chapter 93A claim.

[4] Interstate also made claims against Brown and Freidel's in equity, unjust enrichment, and conversion. Interstate failed to preserve those claims below against Brown; and, in all events, the jury verdict would seem dispositive of their merits. Interstate's conversion claim against Freidel's has been waived on appeal; its claims against Freidel's in equity and unjust enrichment, which were rejected by the jury, are discussed below.

[5] When, as here, such motion was not filed until after a party has moved for summary judgment, the movant must demonstrate that the proposed amendments are supported by "substantial and convincing evidence." *Resolution Trust, 30 F.3d at 253.*

[6] Interstate, moreover, did not object to special questions identifying Brown "d/b/a Integra Technical Services" as the counterclaimant.

[7] Interstate also argues that because Integra no longer existed as of the time of the purported contract with Interstate -- the August 25, 1995 proposal -- Integra could not legally enter into any such contract. We have disposed of this argument.

[8] Although Interstate also challenges the district court's earlier denial of its motion for summary judgment on Brown's counterclaims based on Integra's lack of corporate capacity, the proper redress is not through appeal of that denial but through subsequent motion for judgment as a matter of law, and then through appellate review if that later motion is denied by the trial court. See, e.g., *Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1251 (10th Cir. 1992);* see also *Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1358-59 (9th Cir. 1987).* While Interstate raised the issue of lack of capacity to sue in its Rule 50(b) motion, that argument was properly rejected by the district court given Interstate's failure to present any evidence to the jury on what ultimately boiled down to issues of fact.

[9] Interstate's argument that Freidel's cannot keep its portion of the deposit ($50,000) under the law of equity and unjust enrichment is addressed below in our discussion of Freidel's motion for attorney's fees and double costs.

[10] See, e.g., *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 72 F.3d 190, 204 (1st Cir. 1995)* (citing *Matsushita Elec. Corp. v. Sonus Corp., 362 Mass. 246, 284 N.E.2d 880, 890 (Mass. 1972));* see also *Augat, Inc. v. Aegis, Inc., 417 Mass. 484, 631 N.E.2d 995, 997-98 (Mass. 1994)* ("Damages for lost profits are recoverable only when proof is made with sufficient certainty.") (internal quotation marks omitted).

[11] See, e.g., *Elliott v. S.D. Warren Co., 134 F.3d 1, 6 (1st Cir. 1998)* ("A trial court is obliged to inform the jury about the applicable law, but, within wide limits, the method and manner in which the judge carries out this obligation is left to his or her discretion."); see also *United States v. Paniagua-Ramos, 251 F.3d 242, 245 (1st Cir. 2001)* ("The primary function of a trial court's instructions is to create a roadmap for the jurors, limning those legal rules that they must follow in finding the facts and determining the issues in a given case. For the most part, the law provides no set formulae for

converting these legal rules into lay language -- and the choice of what words are to be spoken belongs, within wide margins, to the trial judge.").

[12] Brown surmises that the jury misunderstood that the $10,000 came out of the $75,000 deposit and was not on top of it, and that the jury then subtracted $85,000 from the requested $272,500 to award him a total of $187,500.

[13] We also reject Interstate's appellate challenge to the admission of Brown's testimony about how he was to be compensated. Brown testified to his personal knowledge of compensation arrangements. It was well within the trial judge's discretion to admit that testimony.

No. 00-2344
No. 00-2522

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

INTERSTATE LITHO CORP.,
Plaintiff, Appellant,

v.

MARC A. BROWN, a/k/a Moshe Brown; INTEGRA TECHNICAL SERVICES, INC.; and FRIEDEL'S MANUFACTURING, INC.
Defendants, Appellees.

JUDGMENT

Entered: July 6, 2001

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. Attorney's fees and double costs are awarded to Friedel's. We retain appellate jurisdiction for the purposes of adjudicating the attorney's fees award.

By The Court

JANICE M. O'NEIL

Acting Clerk.

CIVIL ACTION NO. 97-1 1548-JLT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

INTERSTATE LITHO CORP.,
Plaintiff(s)

v.

MARC A. BROWN A/K/A MOSHE BROWN
INTEGRA TECHNICAL SERVICES, INC., and
FREIDEL'S MANUFACTURING, INC.
Defendant(s)

JUDGMENT IN A CIVIL CASE

TAURO, D.J.

X Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

JUDGEMENT FOR THE DEFENDANT: MARC A. BROWN in the amount of $187,500.00, plus pre-judgement interest at the rate of 12% (percent) per annum from

May 6, 1998(date of counterclaim) through March 2, 2000(date of jury verdict).

Dated: July 31, 2000

TONY ANASTAS, CLERK
By: Deputy Clerk

NOTE: The post judgment interest rate effective this date is 6.375%.

CIVIL ACTION NO. 97-1 1 548-JLT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

INTERSTATE LITHO CORP.,
Plaintiff(s)

v.

MARC A. BROWN A/K/A MOSHE BROWN
INTEGRA TECHNICAL SERVICES, INC., and
FREIDEL'S MANUFACTURING, INC.
Defendant(s)

AMENDED

JUDGMENT IN A CIVIL CASE

TAURO, D.J.

X Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

JUDGEMENT FOR THE DEFENDANT: MARC A. BROWN, in the amount of $187,500.00, plus pre-judgement interest at the rate of 12% (percent) per annum from

May 6, 1 998(date of counterclaim) through March 2, 2000(date of jury verdict).

JUDGEMENT FOR THE DEFENDANT: FREIDEL'S MANUFACTURING,
With respect to Plaintiff's claims.

Dated: October 17, 2000

TONY ANASTAS, CLERK
(By) Deputy Clerk

NOTE: The post judgment interest rate effective this date is 6.375%.

CA No. 97-11548-JLT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

INTERSTATE LITHO CORPORATION,
Plaintiff,

v.

MARC A. BROWN, a/k/a MOSHE BROWN, INTEGRA TECHNICAL SERVICES, INC., and FREIDEL'S MANUFACTURING, INC.,
Defendants

ORDER

March 31, 1999

TAURO, J.,

The court hereby orders as follows:

1. Defendant Freidel's Motion for Summary Judgment [#50] Is DENIED;

2. Plaintiff's Cross Motion for Summary Judgment [#58] is DENIED;

3. Defendant Integra's Motion to Amend Counterclaim [#64] is DENIED;

4. Defendant Brown's Motion to Substitute Party and Amend Counterclaim [#78] is DENIED;

5. Plaintiff's Motion for Summary Judgment with respect to Integra's counterclaims.[#71] is DENIED; and

6. The trial is scheduled for May 3, 1999 at 10:30 a.m.

IT IS SO ORDERED.

United States District Judge

CIVIL ACTION NO.: 97-11548-JLT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

INTERSTATE LITHO CORP.,
Plaintiff

vs.

MARC A. BROWN, A/K/A MOSHE BROWN INTEGRA TECHNICAL SERVICES, INC. AND FRETDEL MANUFACTURING, INC.,
Defendants

MARC A. BROWN'S MOTION TO RENEW OR FOR RECONSIDERATION OF HIS PREVIOUSLY MADE MOTIONS TO SUBSTITUTE MARC A. BROWN AS PLAINTIFF-IN-COUNTERCLAIM AND TO AMEND COUNTERCLAIMS

Defendant and Plaintiff-in-Counterclaim, Marc A. Brown ("Brown"), for his motion to renew his previously made motions for leave to substitute and to amend, states as follows:

On or about August 13, 1998, Brown filed his Motion For Leave To Amend Counterclaim, and his Motion For Leave to Substitute Party. Those motions, and Brown's memoranda in support, are incorporated herein by reference.

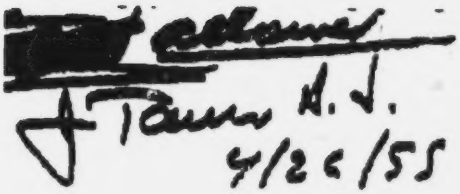
Brown's two motions were addressed by this Court at a hearing held on March 30, 1999, along with several other motions by defendant Freidel Manufacturing, Inc., and plaintiff/counter defendant, Interstate Litho Corp., which related to both procedural and substantive matters. All of the

parties' motions were denied by this Court at that hearing.

Brown seeks to renew his motions for leave to amend and for leave to substitute party. The gist of Brown's motion for leave to amend is to add further allegations to his counterclaim based on M.G.L.c. 93A, based on Interstate's conduct in the transaction at issue, as well as what amounts to false accusations of forgery made in this litigation against Brown. Brown's motion for leave to substitute party is to correct a procedural defect which resulted in a corporation formed by Brown, Integra Technical Services, Inc. being named as a defendant and plaintiff-in-counterclaim rather than Marc A. Brown personally doing business as Integra.

WHEREFORE, defendant/plaintiff-in-counterclaim Marc A. Brown, requests that this Court reconsider and allow Brown's previously made motions for leave to amend, and to substitute party, and for such other and further relief as this court deems just and proper.

THE DEFENDANT /PLAINTIFF-IN
COUNTERCLAIM MARC A. BROWN



Keith A. Minoff,
Esq., of
Robinson Donovan
Madden & Barry,
P.C.
1500 Main Street,
Suite 1600
Springfield,
Massachusetts 01115
Phone (413) 732-2301
Fax (413) *785-4658*
BBO No.: 551536

AFTERNOON PROCEEDINGS

THE CLERK: All rise for the Honorable Court.

THE COURT: Sit down everybody.

(Pause in proceedings.)

THE CLERK: All rise for the jury.

(Whereupon, the jury entered the courtroom.)

THE COURT: Good afternoon, everybody. We're ready to proceed.

MR. TARRO: Your Honor, the plaintiff rests, and I would have a mission.

THE COURT: Okay. Would you show it to me. Do you want to come up here?

MR. TARRO: I actually have two motions.

THE COURT: Counsel, you want to approach.

SIDEBAR CONFERENCE, AS FOLLOWS:

THE COURT: Well, I am going to reserve judgment on these.

MR. TARRO: That's fine.

END OF SIDEBAR CONFERENCE.

THE COURT: Okay. The plaintiff has rested. And that's the legal way for saying there is no more evidence from the plaintiff.

Now, is the defendant going to put in anything?

MR. MINOFF: Yes, Your Honor.

THE COURT: All right. Go ahead.

I think you will find I have covered it to your satisfaction, certainly implicitly if not explicitly.

MR. MINOFF: One more thing, Your Honor.

Would Your Honor be giving an instruction on damages which states something to the effect of, that damages do not need to be calculated with mathematical certainty as long as there is a reasonable basis? I think it's part of the standard.

THE COURT: I am going to let them determine on the basis of the questionnaire what the damage was to your client if they find for him.

Anything else?

MR. TARRO: Your Honor, I wanted to renew my judgment as a matter of law.

THE COURT: Okay. I am going to deny it.

MR. TARRO: May I make part of the record my memorandum, my memorandums, there's two, one with respect to Freidel and one with respect to Brown and Integra?

THE COURT: Yes.

MR. TARRO: Okay.

THE COURT: Why don't you have them marked for identification.

MR. TARRO: Thank you, Your Honor. I think they would be exhibits.

THE COURT: Anything else?

C.A. NO. 97-11548 JLT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

INTERSTATE LITMO CORP.,
Plaintiff.

vs.

MARC A. BROWN, a/k/a MOSHE BROWN INTEGRA TECHNICAL SERVICES, NC. and FREIDEL'S MANUFACTURING, INC.

Defendants.

RENEWAL OF PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW AGAINST DEFENDANTS, MARC A. BROWN, INTEGRA TECHNICAL SERVICES, INC. and FREIDEL'S MANUFACTURING. INC.

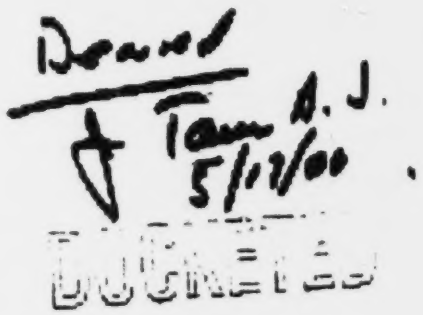
Plaintiff, Interstate Litho Corp., ("Interstate"), hereby renews its Motion for Judgment as a matter of law, pursuant to Fed. R. Civ. Prac. 50(b) against Defendants, Marc A. Brown and Integra Technical Services, Inc., on both Plaintiff's claim and Defendants' counterclaims, and against Freidel's with respect to Plaintiff's claim for return of its deposit.

In further support of its Motion, Plaintiff relies on the accompanying Memorandum of Law.

INTERSTATE LITHO CORP.

Christine M. Curley Esq., BBO# *566955*
275 Beacon Drive
North Kingstown, Rhode Island 02852
(401) 294-0847
(401) 294-0849 (facsimile)

Thomas A. Tarro III, Esq. *#2046*
THE LAW FIRM OF THOMAS A. TARRO III
The Summit East Suite 330
Centerville Road
Warwick, RI 02886
(401) 737-7200
(401) 732- 3362 (facsimile)



C.A. NO. 97-11548 JLT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

INTERSTATE LITHO CORP.,
Plaintiff,

vs.

MARC A. BROWN, a/k/a MOSHE BROWN INTEGRA TECHNICAL SERVICES, INC. and FREIDEL'S MANUFACTURING, INC.
Defendants.

PLAINTIFF'S MOTION FOR NEW TRIAL

Plaintiff, Interstate Litho Corp., ("Interstate") through its undersigned counsel, hereby moves pursuant to Fed. R. Civ. Proc. 59 for a new trial on the grounds that the jury's verdict was clearly against the weight of the evidence and the controlling law.

In further support of its Motion for New Trial, Plaintiff relies upon the accompanying Memorandum of Law.

INTERSTATE LITHO CORP.
By its Attorneys s

Christine M. Curley, Esq., BBO# 566955
North Kingstown, Rhode Island 02852
(401) 294- 847
(401) 294-0849 (facsimile)

Thomas A. Tarro III, Esq. #2046
THE LAW FIRM OF THOMAS A.TARRO III
The Summit East - Suite 330
Centerville Road
Warwick, RI 02886
(401) 737-7200
(401) 732- 3362 (facsimile)

Denied
Tam A. J.
5/12/00

STATE OF NEW HAMPSHIRE

OFFICE OF SECRETARY OF STATE

I, ROBERT P AMBROSE, Deputy Secretary of State of the State of New Hampshire, do hereby certify that the following and hereto attached is a true copy of the correspondence relating to the November 1, 1993 dissolution of INTEGRA TECHNICAL SERVICES, INC. as filed in this office and held in the custody of the Secretary of State.

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Seal of the State, at Concord, this* 31st day of August *A.D. 1998*

Deputy Secretary of State

State of New Hampshire
Department of State
Corporation Division

Concord Tel. 603-271-3244

January 4, 1993

Location: State House Annex -- 3rd floor
Mailing address: State House, Room 204
107 North Main Street
Concord, N.H. 033014989
HELP LINE TDD ACCESS: RELAY N.H. 1-800-735-2964

INTERGRA TECHINICAL SERVICES, INC.
ONE MIDDLE STREET
PORTSMOUTH NH 03801

Dear Sir/Madam:

Enclosed is the above corporation's s 1993 annual report due April 1, 1993. Also due are the 1992 annual report and fees as shown on the face of the report

If you have any questions, please call 603-271-3244 or write to the above address.

ATTENTION: The charters of corporations which fail to file annual reports and/or pay all fees for two years will be forfeited. The Secretary of State will forward notice of dissolution by mail to the corporation at its principal address. The tentative date of dissolution is NOVEMBER 1, 1993. NO OTHER NOTICE WILL BE SENT PRIOR TO THE DISSOLUTION.

Inactive corporations wishing to voluntarily dissolve must file any reports and/or fees due for 1992 and should contact this office for forms. The corporation may be able to avoid having to file the 1993 annual report and fees if voluntary dissolution steps are started immediately.

Very truly yours,

Robert F. Ambrose
Deputy Secretary of State

State of New Hampshire
Department of State
Corporation Division

Concord Tel. 603-271-3244

November 1, 1993

Location: State House Annex -- 3rd floor
Mailing address: State House, Room 204
107 North Main Street
Concord, N.H. 033014989
HELP LINE TDD ACCESS: RELAY N.H. 1-800-735-2964

INTERGRA TECHINICAL SERVICES, INC.
ONE MIDDLE STREET
PORTSMOUTH NH 03801

Dear Sir/Madam:

Having failed to file the annual reports and/or pay all fees due April 1, 1992 and April 1, 1993, with respect to which you were notified by letter from this office dated January 4, 1993, your CORPORATION HAS BEEN DISSOLVED AS OF NOVEMBER 1, 1993, as provided under RSA 293-A:l4.2O.

If you wish to reinstate your corporation by March 1, 1994, the following must be submitted to this of f ice. To reinstate after March 1, 1994 and before November 1, 1996, you must also include a good standing certificate from the N. H. Dept. of Revenue Administration. The name would also have to be checked for availability since the name will only be protected until March 1, 1994. See enclosed copy of RSA 293-A:14.20, 14.21, 14.22 and 14.23.

1992—REPORT FEE $100.00 MAINTENANCE FEE $100.00 LATE FEE $50.00
+ ANNUAL REPORT

199.3—REPORT FEE $100.00 MAINTENANCE FEE $100.00 LATE FEE $50.00
+ ANNUAL REPORT

REINSTATEMENT FORM AND FEE $135.00

GRAND TOTAL $635.00

Very truly yours,

Robert P. Ambrose
Deputy Secretary of State

State of New Hampshire
Department of State
Corporation Division

Concord Tel. 603-27 1 -3244

March 30, 1994

Location: State House Annex -- 3rd floor
Mailing address: State House, Room 204
107 North Main Street
Concord, N.H. 033014989
HELP LINE TDD ACCESS: RELAY N.H. 1-800-735-2964

INTEGRA TECHNICAL SERVICES, INC.
ATTN: MARK BROWN
258 HARVARD AVE SUITE 276
BROOKLINE MA 02146

RE: Reinstatement of corporate charter

The New Hampshire dissolution laws allow a corporation which had its charter forfeited to reinstate within 3 years of the date of forfeiture. Since the corporate name is no longer protected at this time, it must be checked for availability. The corporate name is available at this time but will be re-checked upon receipt of all of the forms and fees listed below.

The following forms and fees must be subuitted to this office in order to reinstate the charter of the above corporation which was involuntarily dissolved on November 1, 1993.

FORMS	FEES
Annual Reports (enclosed) for the years 1992, 1993 & 1994	$600.00

Reinstatement form (enclosed)	$135.00
Certificate of good standing from the N.H. Department of Revenue Adatnistration (see Note 1 on enclosed reinstatement form).	
Total fees due Secretary of State	$735.00

PLEASE RETURN A COPY OF THIS LETTER WITH THE ABOVE MENTIONED FORMS AND FEES

The Commonwealth of Massachusetts

Secretary of the Commonwealth
State House Boston, Massachusetts 02133

September 23, 1998

TO WHOM IT MAY CONCERN:

I hereby certify that the records of this office fail to show that

Integra Technical Services, Inc.

has qualified as a foreign corporation to do business in Massachusetts pursuant to Massachusetts General Laws Chapter 181, section 4.

In testimony of which, I have hereunto affixed the Great Seal of the Commonwealth on the date first above written.

Secretary of the Commonwealth